1990

Troy Darrington v. Stanley L. Wade, Janet Wade, Robert Iverson : Brief of Appellee

Utah Supreme Court

Denver C. Snuffer, Jr.; Maddox, Nelson and Snuffer; Counsel for Appellant.
A. Paul Schwenke; Johnson and Associates; Counsel for Appellees.

IN THE SUPREME COURT OF
THE STATE OF UTAH.

TROY DARRINGTON, Plaintiff/Appellants, v. STANLEY L. WADE and JANET WADE and ROBERT IVERSON, Defendants/Appellees.	90-[illegible] BRIEF OF APPELLEES. Case No. 890274

APPEAL FROM THE GRANT OF SUMMARY JUDGMENT OF DISMISSAL.
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY.
HONORABLE RICHARD H. MOFFAT.

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JURISDICTION OF THE COURT

Jurisdiction of the Supreme Court to hear this appeal is conferred by Sec. 78-2-2(3)(j), Utah Code Annotated, 1953, as amended, and Rule 3 of the Rules of the Utah Supreme Court. The appeal is from a judgment of dismissal in favor of the Appellees pursuant to their motion for summary judgment before Honorable Richard H. Moffat, Third District Court.

OBJECTION TO APPELLANT'S BRIEF

The Appellees object to consideration of the Appellant's brief by the court in that the brief fails to cite to the record. The Appellees specifically requests that the court strike all references to a deposition which has not been published nor made a part of the record.

STATEMENT OF THE ISSUES

Although, the Plaintiff raised three issues on appeal, the first two issues are essentially two sides of the same coin. The issues truly presented for review are as follows:

1. Is it an abuse of discretion for the District Court to set aside an erroneously entered default judgment based only on an objection to a proposed order rather than pursuant to a formal motion to vacate under Rule 60(b), Utah Rules of Civil Procedures?

2. Did the District Court err in finding that no genuine issues of fact exist to prevent summary judgment?

STATEMENT OF THE CASE

Plaintiff brought suit to recover alleged damages as a result of injuries sustained by the Plaintiff while skateboarding at a skateboard park owned by Defendants Stanley L. Wade and Janet Wade, but leased and operated by Defendant Robert Iverson. Plaintiff has a default judgment against Robert Iverson. The case as against the Wades was dismissed with prejudice, no cause of action, on the basis that the admitted cause of the injury was the result of a potential fault of the tenant, not the landlord.

STATEMENT OF FACTS

Plaintiff, Troy Darrington, filed this action for damages for injuries, allegedly suffered on defendants' property on or about June 5, 1983. Amended Complaint, Paragraph 4, R. 189. The plaintiff's injuries were alleged to have been sustained while plaintiff was on defendants' property. R. 189. The plaintiff admitted that on the date of the injuries the property was leased to a Bob (Robert) Iverson and that he was responsible for supervising the condition of the premises. Affidavit of Troy Darrington, R. 427 (hereafter "Darrington affidavit"). The plaintiff admitted that after the property was leased to Robert Iverson, the skateboard run that he used, had a cover on it, but the cover was missing on the day of the injury. Darrington affidavit, R. 427, 428. The lease contract between Defendants Wade and Iverson, granted full, complete and exclusive control of the premises to the tenant reserving no rights of entry,

inspection or repair to the Wades. Lease agreement, R. 426.

SUMMARY OF ARGUMENTS

The District Court's grant of sanctions striking Defendants' pleadings and awarding default judgment was based on the mistaken belief that Stanley L. Wade disobeyed many court ordered discovery requests; and second, that the Wades have deliberately delayed the resolution of the case. Pursuant to Defendants' Objection to the Proposed Order of Sanctions, the District Court, reviewed the file, and discovered that the claimed delay by the Defendants and the alleged disobedience of Court orders by the Defendants were false. The District Court then vacated the order of Sanctions and Default Judgment. The court has the authority to make such a ruling; additionally, the ruling was clearly justified from the record.

The admitted and established facts before the District Court clearly point to an act by the tenant of removing a drain cover which is admitted was the cause of the Plaintiff's fall allegedly sustaining his injuries. The prevailing view is that the Landlord is liable for his own negligence, but not for the tenant's negligence. Therefore, the District Court is clearly correct in fact and law in dismissing the complaint and its ruling must be affirmed.

ARGUMENT

The claims of errors presented by the Plaintiff are without merit. The District Court's decision must be affirmed, and the appeal dismissed with prejudice with an award of Appellees costs

including attorney fees.

POINT I.

THE DISTRICT COURT HAS DISCRETION TO SET ASIDE ITS OWN ORDERS OR JUDGMENTS.

The Plaintiff's brief failed to cite to any authority that the District Court could not reconsider its own orders or judgment. The Plaintiff also failed to cite to any authority for his proposition that the District Court can set aside its own orders only pursuant to a motion to set aside under Rule 60(b), Utah Rules of Civil Procedures. On the other hand, authorities abound as to the District Court's power to vacate its own orders or judgments. The District Court could open up the judgment, enter new findings and new conclusions or even enter a totally new and different judgment. Please see for example: Tebbs & Tebbs v. Oliveto, 256 P.2d 699 (Ut. 1953); Haslam v. Paulsen, 389 P.2d 736 (Ut. 1964); Smith v. Shreeve, 551 P.2d 1261 (Ut. 1976). Lembech v. Cox, 639 P.2d 197 (Ut. 1981). Rule 59(a), Utah Rules of Civil Procedures.

In the recent case of Salt Lake City v. James Construction, Inc. 761 P.2d 42, 44 (Ut. Ct. App. 1988), the Court of Appeals stated that, although a motion to reconsider is not expressly available under the Rules of Civil Procedure, "However, by implication Rule 54(b).... does **allow for the possibility for the judge changing his or her mind** in cases involving multiple parties or multiple claims." (Emphasis added).

The District Court in the instant case, clearly had the authority to vacate its own ruling. Additionally, and as seen

below, the District Court's action was clearly supported by the record.

POINT II.

THE DISTRICT COURT'S RULING VACATING, THE ORDER OF SANCTION STRIKING DEFENDANT'S PLEADINGS AND ENTERING DEFAULT JUDGMENT, IS SUPPORTED BY THE RECORD.

The District Court mistakenly found, due to misrepresentations by the Plaintiff, that Stanley L. Wade disobeyed a court ordered discovery and that the Wades deliberately delayed the resolution of the case. When the District Court discovered that the Defendants fully complied with the Court ordered discovery and also that the delay in this case has been caused by the Plaintiff, the Court quickly correct the error and vacate the erroneous order. Supplemental Statement, R. 350 to 382.

POINT III.

THE DISTRICT COURT CORRECTLY FOUND THAT NO GENUINE ISSUE OF MATERIAL FACT REMAINS TO BE DECIDED.

Although, one of the claimed errors is the existence of genuine factual issues, it is near impossible to identify the alleged factual issue from the Plaintiff's brief. The first reference to an allege factual issue in Plaintiff's brief are the three examples listed on Page 12, and re-stated here as follows:

1. [D]id the Wades have a duty of reasonable care to prevent Darrington's injury?
2. Did they [Wades] breach that duty of care?
3. [D]id they [Wades] know of the dangerous condition which caused Darrington's injury prior to their leasing the skateboard park?

The same three issues, in slightly different wordings, were again

stated under Point II of the Plaintiff's brief on page 18. "A genuine issue of fact exists as to whether the Wades had a duty of reasonable care toward Darrington... ... ... [T]he question of breach of a defendant's duty to a plaintiff is a question of fact for the jury... ... ... Did the Wades know or should they have known of the defects in the skateboard ramp prior to the lease?"

The Plaintiff's assertion of the three listed issues as factual questions still in dispute to barr summary judgment defies reason and common sense. The issue of the Wades duty and breach of that duty is no longer in controversy. The Plaintiff admitted that the property was leased to Robert Iverson at the time of the accident, and the accident was caused by an act that could have been done only by Robert Iverson. R. 427, 428. Based on this admission, the District Court was bound to apply the existing law and find that the Wades, as mere landlords, had no duty to the Plaintiff for the potential negligence of the tenant. Please see discussion under Point IV below.

Although the question of notice is moot when there is no duty, it must be pointed out to this court that the Plaintiff's admission, that the cause in fact of his injuries was an act or omission by Robert Iverson or someone under his control, it follows logically, that the knowledge of the landlord no longer has any bearing on the outcome of the claim. R. 427, 428.

POINT IV.

THE DEFENDANTS, LANDLORDS, ARE NOT LIABLE FOR THE ALLEGED INJURIES UNDER CURRENT LAW.

The law is well settled here, as well as the majority of

other jurisdictions, as to the liability of a landlord, for injuries to a tenant's patrons occurring on the leased premises.

> A landlord is bound by the usual standard of exercising ordinary prudence and care to see that premises he leases are reasonably safe and suitable for intended uses, and under appropriate circumstances, landlord may be held liable for injuries caused by any defects or serious conditions which he created, or of which he was aware, and which he should reasonably foresee would expose others to an unreasonable risk of harm.

Stephenson v. Warner and Greenwood, 581 P2d 567, 568 (Utah 1978) citing 49 Am. Jur. 2d, Landlord and Tenant, Sec 782; Restatement, Torts, Sec 282. Also see Montoya vs. Berthana, 439 P2d 853 (Utah 1968).

Although the landlord is not absolutely immune from liability, the landlord's liability, however, is limited to only two situations. First, the landlord is liable for injuries caused by defects or serious conditions he created; and second, the landlord is liable for any defects or serious conditions that he was aware of, or that he should reasonably foresee. English v. Kienke, 774 P.2d 1154 (Ut. Ct. App. 1989) following Stephenson. Each of these conditions are addressed separately below.

A. THE WADES' DID NOT CREATE ANY DEFECTS OR SERIOUS CONDITIONS ON THE LAND WHICH CAUSED THE PLAINTIFF'S INJURIES.

The plaintiff claimed that his injuries were caused when he fell after his skateboard wheel was caught in an open drain. R. 427, 428. The plaintiff admitted that the drain was covered on other occasions when he used the same skateboard run. Some of these occasions were after the park was leased by Robert Iverson. R. 427, 428. The drain cover was apparently removed when somebody was cleaning the drain and forgot to put the cover back on. If there is any negligence here, for failure to cover the

drain, the negligence belongs exclusively to Robert Iverson and those under his control. This clearly vindicates the Wades from any claim that they created the defect or dangerous condition. The cause of the injury as admitted was a matter completely within the control and responsibility of the tenant.

B. THE WADES' WERE NOT AWARE OF THE OPEN DRAIN NOR COULD THEY HAVE FORESEEN THAT THE TENANT OR HIS EMPLOYEES WOULD FORGET TO COVER THE DRAIN.

The Plaintiff admitted that he skateboarded at the skateboard park after Robert Iverson leased the park from the Wades. R. 427, 428. The Plaintiff also admitted that one of the skateboard runs was abandoned and was not to be used because it had no drain cover. R. 427, 428. The Plaintiff also admitted that he skateboarded on one of the usual runs which had a drain cover. The cover was missing from the same run on the day of the accident. The Plaintiff then asserts that because one skateboard run was closed at the time of the lease to Robert Iverson, due to the missing drain cover, the Wades knew or should have known that Robert Iverson, or someone under his control, would forget to cover the drain on one of the usual runs. This assertion is absurd. There is no duty for a landlord to be a psychic and foretell what his tenant will or will not do. The Wades were not aware of the open drain nor could they have known that Robert Iverson would remove the cover from the drain. The lease agreement gave complete and full responsibility to the tenant reserving no rights of inspection or of entry, and the Defendants never entered the premises after the Lessee took possession. R.

426.

The law is clear as applied to the facts herein, "where the tenant creates or permits to come into existence a dangerous condition on the premises after he has taken possession, it is the tenant rather than the landlord who is liable for injuries resulting from the dangerous condition." Greenwood, supra at 568. (Emphasis added).

The District Court granted the Plaintiff a default judgment against the tenant, Robert Iverson. The Plaintiff is entitled to that judgment under the current state of the law. To attempt to extend said liability to the landlord is pushing beyond the limits of settled law.

REQUEST FOR COSTS AND ATTORNEY FEES

The Court please note that the totality of the record in this case speaks loudly of the improper conduct of the plaintiff and his counsel in bringing this case in the first place, let alone pursuing this appeal. This appeal violates Rule 33, Rules of this court against frivolous appeals. The Plaintiff's appeal has no reasonable legal or factual basis. Obrien v. Rush, 744 P.2d 306 (Ut. Ct. App. 1987). The Wades have paid substantial costs and attorney fees to defendant this frivolous suit and appeal. The Wades pray for reimbursement for their costs and fees as the court deems just.

CONCLUSION

The District Court has the power to vacate its own orders or judgments and at any time if justice dictates. Here, the

District Court was justified and was well within the bounds of its discretion to vacate its order of sanctions, striking defendant's pleading and entering default. The District Court's finding that no genuine factual issue remains in this case is supported by the record and admissions of fact by the Plaintiff.

The Wades did not create, nor were they aware of, nor could they reasonably foresee a defect or dangerous condition on the property. The allege defect is attributed wholely to the actions or inactions of defendant, Robert Iverson. Plaintiff is entitled to his default judgment against the tenant, but not the landlord under current law.

This appeal violates Rule 33, Rules of the Utah Supreme Court in that it has no reasonable legal or factual basis, and the Defendant should be awarded all their costs including attorney fees.

DATED this 21st day of March, 1990.

A. Paul Schwenke
Attorney for Appellees

CERTIFICATE OF MAILING

I hereby certify that I mailed, with postage prepaid, a true and correct copy of the foregoing Brief of Appellees this 21st day of March, 1990, to Denver C. Snuffer, 64 East 6400 South, #120, Murray, Utah 84107.

APPENDIX

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

TROY DARRINGTON,	:	MINUTE ENTRY
Plaintiff,	:	Civil No. 830906695
vs.	:	
STANLEY L. WADE and JANET WADE and ROBERT IVERSON	:	
Defendants.	:	

The Court having considered the defendant's Motion for Summary Judgment, the Memorandum in Support thereof, the Reply to Summary Judgment, the Cross Motion for Entry of Default, the Memorandum in Opposition to the defendant's Motion for Summary Judgment and in Support of the plaintiff's Motion to Re-enter Default and the objection to the defendant's Motion for Entry of Judgment of Dismissal filed on May 22, 1989 which pointed out that the prior Minute Entry in this matter was entered when the plaintiff's Reply in Opposition to the Motion to the Summary Judgment and other documents enumerated above were evidentially not in the file and having now reconsidered the matter, the Court

makes this its:

DECISION

The defendant's Motion for Summary Judgment is granted for the reasons, inter alia, as set forth in the Memorandum in Support thereof. The Court specifically finds that it is without dispute that the lease provided that the tenants would have the complete and exclusive control and possession of the premises and that under the law the defendant as landlords have no liability for injuries occurring on a leased premises absent of evidence of their negligence. None has been raised here, nor has any evidence been raised which alleged that these defendants created a condition which caused plaintiff's injuries. As a matter of fact the affidavit of Troy Darrington filed on April 28th herein indicates that he was aware that a drain cover was missing from one of the skateboard runs and that that skateboard run was not in use. He says that as he visited the premises on subsequent occasions the missing drain cover was always in the same run and that that run was abandoned and unused. He then goes on to state that on the day of his injury he skateboarded on one of the usual runs from which a drain cover had been removed. It is obvious that the landlord could not have removed that drain cover as the sole possession of the premises had been surrendered under the lease to the tenant. Therefore even from the testimony or affidavit of the plaintiff himself it becomes apparent that his injury was caused by his use of a run which he normally had used from which the tenant had removed a drain cover. The Court can see no way in which this would be

attributable to any act or failure to act on behalf of the landlord. The Judgment of Dismissal heretofore furnished in this matter will therefore be signed and entered. The Court is of the opinion that the defendant's Motion to Re-enter its prior Order of Dismissal in this case is not well taken and that motion is denied.

Dated this 25 day of May, 1989.

Richard H. Moffat
District Court Judge

COAST

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 26th day of May, 1989:

A. Paul Schwenke
800 McIntyre Building
68 South Main Street
Salt Lake City, Utah 84101

Mr. Denver Snuffer
428 East 6400 South
Murray, Utah 84107

Wesley K. Armstrong

C00[illegible]

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68 South Main Street
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**IN AND FOR THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

TROY DARRINGTON,	)	
	)	
Plaintiff,	)	**JUDGMENT OF DISMISSAL**
	)	
vs.	)	
	)	**Civil No. C 83 6695**
STANLEY L. WADE and JANET,	)	
	)	**Judge Richard H. Moffat**
Defendant,	)	

This matter came on regularly before the court on motion of defendants, Stanley L. Wade and Janet Wade, for an order granting an entry of judgment of dismissal on this action. The plaintiff has been represented by Denver C. Snuffer and A. Paul Schwenke represented the defendant. The matter was submitted for decision pursuant to a Notice to submit for a Decision, dated April 14, 1989.

The court having been fully appraised of the facts in the record and as presented by Affidavit and having reviewed and examined the pleadings, memorandum filed in support of defendants' motion for summary judgment, and good cause otherwise appearing.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs action herein is dismissed with prejudice, no cause of action, and the parties in this matter to have their own costs and attorneys fees accrued.

DATED this 23 day of May, 1989.

Honorable Richard H. Moffat

CERTIFICATE OF SERVICE

This is to certify that on the 18th day of May, 1989, a true and exact copy of the foregoing Judgment Of Dismissal was mailed postage prepaid to:

Denver C. Snuffer, Jr. Esq.
488 East 6400 South #120
Murray, Utah 84107